IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

1. S.B. Civil Sales Tax Revision No.1274/2002

Commercial Taxes Officer, Special Circle, Pali.
vs.
M/s. P.G. Foils Limited, Pali.

2. S.B. Civil Sales Tax Revision No.1266/2002

Commercial Taxes Officer, Special Circle, Pali.
vs.
M/s. P.G. Foils Limited, Pali.

3. S.B. Civil Sales Tax Revision No.1271/2002

Commercial Taxes Officer, Special Circle, Pali.
vs.
M/s. P.G. Foils Limited, Pali.

4. S.B. Civil Sales Tax Revision No.1272/2002

Commercial Taxes Officer, Special Circle, Pali.
vs.
M/s. P.G. Foils Limited, Pali.

5. S.B. Civil Sales Tax Revision No.1320/2002

Commercial Taxes Officer, Special Circle, Pali.
vs.
M/s. P.G. Foils Limited, Pali.

6. S.B. Civil Sales Tax Revision No.1321/2002

Commercial Taxes Officer, Special Circle, Pali.
vs.
M/s. P.G. Foils Limited, Pali.

7. S.B. Civil Sales Tax Revision No.1322/2002

Commercial Taxes Officer, Special Circle, Pali.
vs.
M/s. P.G. Foils Limited, Pali.

8. S.B. Civil Sales Tax Revision No.1269/2002

Commercial Taxes Officer, Special Circle, Pali.
vs.
M/s. P.G. Foils Limited, Pali.

9. S.B. Civil Sales Tax Revision No.1270/2002

Commercial Taxes Officer, Special Circle, Pali.
vs.
M/s. P.G. Foils Limited, Pali.

10. S.B. Civil Sales Tax Revision No.1273/2002

Commercial Taxes Officer, Special Circle, Pali.
vs.
M/s. P.G. Foils Limited, Pali.

11. S.B. Civil Sales Tax Revision No.118/2004

Commercial Taxes Officer, Pali.
vs.
M/s. Foils India Laminate (P) Limited.

12. S.B. Civil Sales Tax Revision No.133/2004

Commercial Taxes Officer, Pali.
vs.
M/s. Foils India Laminate (P) Limited.

13. S.B. Civil Sales Tax Revision No.249/2004

Commercial Taxes Officer, Pali.
vs.
M/s. Foils India Laminate (P) Limited.

14. S.B. Civil Sales Tax Revision No.253/2004

Commercial Taxes Officer, Pali.
vs.
M/s. Foils India Laminate (P) Limited.

15. S.B. Civil Sales Tax Revision No.254/2004

Commercial Taxes Officer, Pali.
vs.
M/s. Foils India Laminate (P) Limited.

16. S.B. Civil Sales Tax Revision No.255/2004

Commercial Taxes Officer, Pali.
vs.
M/s. Foils India Laminate (P) Limited.

17. S.B. Civil Sales Tax Revision No.432/2004

Commercial Taxes Officer, Pali.
vs.
M/s. Foils India Laminate (P) Limited.

18. S.B. Civil Sales Tax Revision No.433/2004

Commercial Taxes Officer, Pali.
vs.
M/s. Foils India Laminate (P) Limited.

19. S.B. Civil Sales Tax Revision No.367/2005

Commercial Taxes Officer, Pali.
vs.
M/s. Foils India Laminate (P) Limited.

20. S.B. Civil Sales Tax Revision No.218/2005

Commercial Taxes Officer, Pali.
vs.
M/s. Miracle Foils (P) Limited.

21. S.B. Civil Sales Tax Revision No.246/2004

Commercial Taxes Officer, Pali.
vs.
M/s. Miracle Foils (P) Limited.

22. S.B. Civil Sales Tax Revision No.251/2004

Commercial Taxes Officer, Pali.
vs.
M/s. Miracle Foils (P) Limited.

23. S.B. Civil Sales Tax Revision No.435/2004

Commercial Taxes Officer, Pali.
vs.
M/s. Miracle Foils (P) Limited.

24. S.B. Civil Sales Tax Revision No.437/2004

Commercial Taxes Officer, Pali.
vs.
M/s. Miracle Foils (P) Limited.

Date : 8.1.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr. Sangeet Lodha a/w Ms.Aditi Lodha, for the petitioner.

Mr. Rajendra Mehta a/w Mr.Anjay Kothari & Mr.Niraj Jain, for the respondent.

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BY THE COURT :

REPORTABLE

Heard learned counsel for the parties.

These revision petitions preferred by the Revenue involve same questions of law and, therefore, all these

revision petitions are heard together and are being decided by this common order.

These revisions petitions were taken up for hearing and after hearing the learned counsel for the parties, this Court, with the assistance of the learned counsel for the parties, formulated following questions of law by order dated 13.10.2006 :-

1. Whether Rajasthan Tax Board was right in holding that 'aluminium foils' are covered within expression 'non-ferrous sheets' used in the Notification dated 31.12.1975 issued by the State Govt., under Section 8(5) of Central Sales Tax Act, 1956, and therefore, taxable at concessional rate of 1% during the period in question ?
2. Whether the 'aluminium foil' is a commodity different from 'aluminium sheets' in commercial and common parlance or whether 'aluminium foil' is also known in common parlance as a thin sheet and hence falls within the expression 'sheets' used in the Notification dated 31.12.1975?
3. Whether 'aluminium foils' even after lamination and printing would continue to be covered under said Notification dated 31.12.1975 and hence taxable at the concessional rate of 1%?
4. Whether in view of determination made by the Commissioner, Commercial Taxes, under Section 12-A of the Rajasthan Sales Tax Act, 1954,

holding that aluminium foils even after lamination and printing remains aluminium foils and would, therefore, attract Central Sales Tax @ 1% under Notification dated 13.6.1985, having attained finality, is it open to the Department to agitate that interstate sale of laminated and printed aluminium foils would be taxable as packing material and not as aluminium foil?

5. Whether the Notification dated 13.6.1985, prescribing the rate of tax on 'aluminium foil' only clarifies the earlier Notification dated 31.12.1975?
6. Whether the functional character/end-use of a commodity is relevant for consideration as to under which entry of the tax schedule the commodity falls for the purpose of levying the tax?
7. Whether the 'aluminium foil' is neither sheet nor packing material, and therefore, would be taxable under residuary entry?
8. Whether Rajasthan Tax Board was right in relying upon the additional evidence produced before it on behalf of the assessee without passing specific order admitting such additional evidence on record, more so, when according to the Department, the copies of the said additional evidence were not made available to them and they were not given opportunity to rebut the same.
9. Whether the Department has waived objection about the consideration of additional evidence produced by the assessee before Rajasthan Tax Board, while deciding appeals No. 8 to 11 of 1995 by judgment dated 8.2.1999, by not raising such objection later

on, either before the Tax Board or the lower authorities or in Revision Petitions filed before this court against the Judgment dated 8.2.1999 or in revisions filed by them against subsequent judgments passed by the Tax Board following the judgment dated 8.2.1999?

10. Whether the finding recorded by the learned Tax Board are contrary to law and facts and perverse?

Before that, the record from the Tax Board in relation to these revisions were called.

It will be useful to narrate facts in relation to the earlier round of litigation leading to the decision of this Court dated 12.9.1994 because of the reason that for the question whether the aluminium foil is covered under the notification dated 31.12.1975 (S.No.302)and is taxable at the rate of 1%. The matter came up before this Court and same question is core question in these revision petitions because of reason that second round is due to remand order which was upheld by the High Court. The notification dated 31.12.1975 (S.No.302) is as under :-

“S.No.302 : F.5(25)FDCT/72-79 dated 31.12.1975
S.O. 243.-In exercise of the powers conferred by S.8 (5), CST Act, 1956, the State Govt. hereby directs that with effect on and from 1.1.1976, the tax payable under

sub-section (1) of the said section by any dealer having his place of business in the State, in respect of the sale by him from any such place of business in the course of inter-State Trade, of the goods specified in column number 2 of the list appended hereto, to which sub-section (1) applies, shall be calculated at the reduced rate shown against it in column number 3 of the said list on furnishing of a declaration in Form “C” or a Certificate in Form “D”, as the case may be.

| S.No. | Description of goods | | Rate of tax |
|---|---|---|---|
| 1. | Non-ferrous rods, pipes, strips, sections, sheets, circles, and tubings. | ... | 1% |

For this dispute, an application was submitted by the assessee M/s. PG Foils Ltd. under Section 12A of the Rajasthan Sales Tax Act, 1954 (for short 'RST Act, 1954') for obtaining decision from the Additional Commissioner, Commercial Taxes, Rajasthan, Jaipur. The Additional Commissioner vide his order dated 18.7.1984 held that the aluminium foils are not covered by the notification dated 31.12.1975. Meanwhile, the assessing authority passed separate provisional assessment orders under Section 9 of the RST Act against the assessee for the years from 1982 to 1986 which were challenged by the assessee by preferring appeals before the Deputy Commissioner (Appeals), Commercial Taxes, Jodhpur. The Deputy Commissioner (Appeals) dismissed the appeals vide orders dated 26.9.1988 (one appeal) and 31.12.1988

(3 appeals). The assessee preferred further appeals against both the matters – one arising out of the application under Section 12A and another against the provisional assessment orders passed by the assessing authority which were upheld by the appellate authority. These five appeals were partly allowed by the Rajasthan Sales Tax Tribunal, Ajmer vide order dated 26.2.1991 and the matter was remanded to the assessing authority for deciding the issue whether the sheet of specific measurement of thickness is covered under the notification dated 31.12.1975 or not, after giving opportunity to both the parties to produce evidence.

The assessee being aggrieved by the order of remand passed by the Sales Tax Tribunal dated 26.2.1991 preferred revisions before this Court which were decided by this court vide judgment dated 12.9.1994. The relevant portion of the order of this Court in judgment dated 12.9.1994 is as under :-

> "The word used sheet is not technical in expression or a word of art but the word of everyday use. It is relevant to look as to how the goods is known in the trade and treated in the trade literature, are the relevant and significant and rather decisive factor. If special type of goods is subject matter of a fiscal entry then that entry must be understood in the context of that particular trade, bearing in mind that particular word. The trade meaning

> is one which is prevalent in that particular trade where the goods is known or traded. Therefore, in the absence of any definition of the word “sheet”, whether it would include all types of foils, depends as it is understood in a common parlance, that is, how the public in general conversant with the subject matter has dealt with it and understood. The word is being required to be given a popular meaning. In the present case, the Tribunal has observed that no evidence has been led by the parties so as to understand the popular meaning of “sheet” by the persons carrying on business in non-ferrous metal and thus, remanded the matter giving opportunity to the parties to lead evidence on that point. In my considered opinion, the approach of the Tribunal is correct. Whether the foil is included in the commodity mentioned in the notification depends on the facts proved in this case. I do not find any illegality committed by the Tribunal in remanding the matter, where both the parties will have opportunity to lead evidence and establish the fact as to how the commodity “foil” is understood by the persons dealing with the commodity.”

At this juncture, it will be relevant to mention here that Section 12A of the RST Act, 1954 provides that if any question arises otherwise than in the proceedings before a Court or under Sections 7A, 7B, 10, 10A, 10B or 12, any person or firm etc. may submit application to the Commissioner, Commercial Taxes for

determination of the questions upon which the Commissioner is required to determine such question.

It appears from the facts of the case that initially the assessee sought determination of the disputed question about the liability of tax on sale of aluminium foils under Section 12A but subsequently, after the decision of this Court dated 12.9.1994, the assessee withdrew this application filed under Section 12A obviously because of the reason that the same question became subject matter before the authorities in regular course and was brought before this High Court by the assessee by filing revisions and the determination of question by the Commissioner, Commercial Taxes would be an exercise in futility.

After the decision of this Court dated 12.9.1994, upholding the order of the Sales Tax Tribunal dated 26.2.1991, the matters were again examined by the assessing authority for various years. The parallel proceedings – one for provisional assessment and another for final assessment, of tax liability of the assessee on sale of aluminium foils were taken up by the assessing authority at various times. The dates of the orders passed by the various authorities are not very much relevant because of the reason that the ultimate decisions holding the assessee liable to pay tax at the rate of 4% instead of 1% were passed by the

Tax Board on the basis of the Tax board earliest decision dated 8.2.1999 wherein the Tax Board held that the aluminium foil is taxable under notification dated 31.12.1975 at the rate of 1%. By now several orders are passed by the Tax Board in relation to the assessee's tax assessment for various years and, therefore, in all matters, the revenue is aggrieved against the impugned orders of the Tax Board passed on various dates by following the Tax Board's earlier order dated 8.2.1999.

It will be worthwhile to mention here that the order of the Tax Board dated 8.2.1999 was challenged by preferring revisions before this Court but those revisions were dismissed by this Court in view of the fact that the order dated 8.2.1999 was incorporated in the assessee's final assessment proceedings and the revenue has already preferred revisions to challenge the final assessment orders passed by the Tax Board involving the same question whether the aluminium foil is taxable under the notification dated 31.12.1975. Meaning thereby, the order dated 8.2.1999 remained sub-judice despite dismissal of revisions filed by revenue to challenge the order dated 8.2.1999 as those revisions were dismissed as infructuous only and not on merit and dismissed because of the reason that the legality of the order dated 8.2.1999 in the case of assessees themselves was sub-judice before this Court

in the revisions preferred by the revenue.

As stated above, in all the present revisions, the core question involved is whether the aluminum foil is covered under the notification dated 31.12.1975 or not. For this, there are several contentions of both the parties for which the questions of law were framed by this Court as mentioned above.

During the course of arguments, this Court found it appropriate to summon the record of the Tax Board as learned counsel for the revenue vehemently submitted that the evidence considered by the Tax Board while deciding the appeals of the assessee by order dated 8.2.1999, was produced before the Tax Board and the Tax Board without affording any opportunity of hearing to the revenue to contest the assessee's application seeking permission to produce additional evidence and without passing any order of taking on record the evidence, decided the appeals in favour of the assessee only on the basis of the evidence produced by the assessee in such manner.

Learned counsel for the revenue vehemently submitted that from the record, it appears that even the copy of the application seeking permission to produce additional evidence was not provided to the revenue. Further, from the record, it appears that the

appeals were fixed for hearing and the date was preponed and the appeals were decided by the Tax Board on the day when the appeals were listed for orders on application for early hearing of the appeals. It is also submitted that in the order dated 8.2.1999, the Tax Board itself mentioned that the documents were produced during the course of arguments but it appears from the record that the documents were produced before the Tax Board by filing the documents in the Tax Board on the day when the appeals were not fixed for hearing.

Learned counsel for the revenue also submitted that it appears that the Tax Board may have proceeded on assumption that the evidence has already been taken on record by the Tax board. It is also submitted that the revenue could not get any opportunity to rebut the evidence produced by the assessee. It is also submitted that the assessee did not submit any evidence before the assessing authority or before the first appellate authority despite the fact that as back as in the year 1994, this Court upheld the order of the Sales Tax Tribunal as it was an order for remanding the matter to the assessing authority for holding the enquiry and opportunity was granted to the assessee to produce evidence but he did not produce any evidence. It is also submitted that there was no reason or ground in the application for producing additional evidence at second appellate stage.

Learned counsel for the respondent/assessee vehemently submitted that the documents were taken on record in the knowledge of the petitioner/revenue and they did not challenge the order of the Tax Board on this ground that the documents were taken on record without giving opportunity to the revenue. It is also submitted that otherwise also, the revenue could have produced any evidence even before this Court with the leave of this Court, if the revenue was in fact aggrieved and wanted to rebut the evidence produced by the assessee before the Tax Board. It is also submitted that in none of the revisions either challenging the order of the Tax Board dated 8.2.1999 and in these revisions, the petitioner/revenue has formulated any question on this issue. Learned counsel for the assessee also submitted that otherwise also, this Court also can examine the issue involved in these revisions because of the reason that the issue is only whether the “aluminium foils” fall in the word “sheet” and, therefore, liable for tax at the rate of only 1%.

I considered the submissions of learned counsel for the parties, perused the record of the case as also, the reasons given by the Tax Board in its order dated 8.2.1999 and the reasons given in the impugned order under challenge in these revisions which were

passed by the Tax Board after relying upon the order of the Tax Board dated 8.2.1999.

So far as the contention of learned counsel for the respondent/assessee that this Court itself may decide the question whether the aluminium foil is covered under the notification dated 31.12.1975 is concerned, that cannot be accepted because of the reason that in earlier round of litigation, the then Tax Tribunal held that the question raised by the assessee can be decided and should be decided after evidence and that view was upheld by this Court in its order dated 12.9.1994. Otherwise also, finding on the contentious question ordinarily must come from the regular proceedings and from the authorities concerned.

It is not disputed by even learned counsel for the assessee that the order dated 8.2.1999 has not attained finality in view of the fact that the said order was challenged by the revenue by filing revisions before this Court and those revisions were dismissed only on the ground that they have become infructuous because of the reason that for the same assessment years, final assessment orders were passed by the assessing authorities and were taken upto the Tax Board and the Tax Board has followed the view taken by the Tax Board in its order dated 8.2.1999 and the revenue has

challenged those final orders by preferring revisions before this Court questioning the validity and illegality of the view taken in the order dated 8.2.1999. In view of the above, this Court can examine the validity and illegality of the order dated 8.2.1999 in these revisions, hence, it will be necessary to examine the legality of the order dated 8.2.1999.

The revenue heavily pressed the question no.8 formulated by this Court whereas the respondent took plea of waiver for which question no.9 has been framed. The question no.8 is if decided in favour of the revenue, then that goes to the root of the matter, therefore, questions no.8 and 9 are considered first.

The total foundation of the order dated 8.2.1999 is the evidence produced by the assessed before the Tax Board which he did not produce before the assessing authority or the first appellate authority. In addition to the above, the Tax Board relied upon the dictionary meaning of the word “foil” and thereafter held that the aluminium foils are taxable as per the notification dated 31.12.1975. So far as dictionary meaning of foil is concerned, that may be a basis for determining the nature of the commodity but cannot be a conclusive proof in tax matter because of the reason of precedence given to common parlance meaning of the commodity in

trade and the meaning which is being understood by the person dealing in and public using the commodity. Substantially the finding of the Tax Board in its order dated 8.2.1999 is based on the evidence produced by the assessee before the Tax Board and it has materially influenced the Tax Board in arriving at a conclusion that the aluminium foil manufactured by the assessee is covered under the notification dated 31.12.1975, therefore, it will be necessary to look into the record of the Tax Board to find out whether the Tax Board has committed material illegality and irregularity in admitting the additional evidence produced by the assessee for the first time in second appeal before the Tax Board. It will also be necessary to find out whether the Tax Board had at all applied its mind to the question whether the assessee can be permitted to produce evidence in second appeal and if the assessee can be permitted to produce additional evidence in second appeal, whether an opportunity was given to the revenue to meet with the additional evidence produced by the assessee before the Tax Board.

It is true that the revenue in its revisions preferred to challenge the order dated 8.2.1999 as well as in the present revisions preferred to challenge the final assessment orders and orders passed for subsequent years have not raised the above grounds but

finding some substance in the contention of learned counsel for the revenue, this Court summoned the record from the Tax Board and from the record, it appears that the Tax Board has committed material illegality and irregularity while deciding the appeals vide order dated 8.2.1999 for the reasons mentioned below which constitute question of law and which question of law arises from the record of the case itself and, therefore, this Court can examine this question of law despite the fact that the objection has been raised by counsel for the revenue for the first time during the course of arguments without pleading the ground in the revision. The facts are glaring, therefore, such illegality cannot be allowed by this Court in the order of Tax Board dated 8.2.1999.

It will be suffice to mention facts from one of the record of the Tax Board. From the record, it appears that in the margin of order-sheet of 18.4.1996, there is an office note that additional evidence produced. There is no mention when the said additional evidence was produced. Be it as it may be, in the record, there is an application which appears to have been submitted on 25.7.1996 as there is an endorsement of presentation of the application obviously by the office clerk of Tax Board wherein it is mentioned that an application was submitted by Shri Alkesh Sharma, Advocate on 25.7.1996. The next date on the top of the

said application given is 19.9.1996. On 19.9.1996, the case was listed before the Division Bench of the Tax Board but this fact of filing of the application and documents by the assessee is not recorded in the order-sheet. The matter was listed before the Tax Board thereafter on 19.12.1996, 13.3.1997, 19.6.1997, 3.7.1997, 17.7.1997, 18.8.1997, 18.12.1997, 19.2.1998, 18.6.1998 and 30.9.1998. On 19.11.1998, the next date was given as 18.2.1999. On all these occasions, there is no mention of the application filed by the assessee seeking permission to produce additional evidence or of giving copy of application to the counsel for the revenue. There is no endorsement on the application of delivery of copy of application to the counsel for revenue. Therefore, it appears that the copy of application for additional evidence was submitted in the office of Tax Board and was never dealt with by the Bench hearing the appeals. By the order dated 19.11.1998, the next date was given for hearing of the appeal as 18.2.1999. On 27.1.1999, on application of the assessee for early hearing of the appeals, the Registrar, Tax Board ordered for listing of the appeals for orders on assessee's prayer for preponing the date in appeals before the Bench on 28.1.1999. On 28.1.1999, when the appeals were listed for orders on application for early hearing, it appears that the arguments on the appeals were heard and the Tax Board passed the

judgment on 8.2.1999. The Tax Board did not pass any order for taking on record the additional evidence filed by the assessee apart from the fact that from the record, it is not coming out that the revenue was ever given copy of even the application seeking permission to produce the additional evidence at second appellate stage. Before 8.2.1999, no order for taking evidence on record was passed by the Tax Board and in the order dated 8.2.1999 in para 22, the Division Bench of Tax Board mentioned that during the course of arguments, the assessee/appellant submitted about 30 documents and even then the Tax Board straightaway passed the order in favour of the assessee relying upon the documents produced by the assessee. At this time also, the Tax Board has not recorded any reason for allowing the assessee to produce the documents at the second appellate stage.

In these facts and circumstances, it appears that the very foundation of the order dated 8.2.1999 is the additional evidence produced by the assessee and the pleas taken by the assessee on the basis of those documents and the Tax Board relied upon those documents without affording an opportunity of hearing to the revenue nor gave any opportunity to the revenue to produce evidence to rebut the documentary evidence by the assessee and the Tax Board's order dated 8.2.1999 is based on the evidence produced by the assessee,

therefore, only on this ground alone, the order of the Tax Board dated 8.2.1999 deserves to be set aside in the revisions preferred by the revenue to challenge the impugned orders passed in final assessment proceedings for the years 1982 to 1986.

When facts are glaring and are apparent from the record of the Tax Board, the revenue cannot be denied opportunity to meet with the evidence produced by the assessee at the back of revenue and, therefore, in the peculiar facts of the case, it cannot be held that the department consciously waived objection about consideration of additional evidence produced by the assessee before the Tax Board while deciding appeals no.8 to 11/1995 by judgment/order dated 8.2.1999 merely because the revenue failed to take objection in the memo of revision petition. Even if the department was not vigilant in looking into the record of the Tax Board, then also for this, the department cannot be denied opportunity to meet with the evidence produced by the assessee at the back of revenue. Therefore, the question of law no.9 is decided against the assessee and the question of law no.8 is decided in favour of the revenue.

At this juncture, it will be appropriate to observe that though the assessee produced additional

evidence before the Tax Board in second appeal but the Tax Board held those documents relevant for the purpose of deciding the controversy involved in these matters. Therefore, it will be appropriate to allow the assessee to rely upon the documents which it has submitted before the Tax Board in above four appeals and the ends of justice can be met if the revenue is granted opportunity to meet with this evidence.

In view of the above, all these revision petitions deserve to be allowed, hence, allowed. The order dated 8.2.1999 is set aside and consequently, all the impugned orders passed by the Tax Board following the reasons given in the order dated 8.2.1999 and which are impugned in these revisions are set aside.

The matter is remanded back to the Tax Board to decide all the appeals including the appeals decided by the order dated 8.2.1999 afresh in accordance with law and after considering the evidence which may be produced by the revenue in rebuttal to the evidence produced by the assessee before the Tax Board.

Since this Court held that the order dated 8.2.1999 has been passed with material illegality and irregularity, therefore, the appeals which were decided by the order dated 8.2.1999 shall also stand revived by this order and the Tax Board may consider the evidence

in those revisions after affording opportunity to the revenue to rebut the evidence.

Both the parties are directed to appear before the Tax Board on 19.2.2007.

(PRAKASH TATIA), J.

S.Phophaliya